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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 IN RE BANG ENERGY DRINK
17 MARKETING LITIGATION

Case No. 4:18-cv-05758-JST-RMI
(Consolidated with 4:18-cv-06300)

18
19 DEFENDANT'S MOTION FOR RELIEF
FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE (ECF
82)

20 Complaint filed: September 19, 2018
21 Consolidated Class Action Complaint filed:
October 31, 2019

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant VITAL PHARMACEUTICALS, INC., d/b/a VPX SPORTS (“VPX”), hereby moves for Relief from Nondispositive Pretrial Order of Magistrate Judge pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Civil L.R. 72-2, and objects to the Honorable Robert M. Illman United Stated Magistrate Judge’s order dated November 8, 2019 (ECF No. 82), and will and hereby does move for an order denying Plaintiffs’ motion to compel production of documents responsive to request No. 30 because it requires production of VPX’s complete and un-redacted confidential trade secret formula for the BANG® energy drink product:

1. Defendant is ordered within 21 days of entry of this order to provide Plaintiffs with documents concerning the formulations of the Bang energy drinks in response to Plaintiffs' Request for Production No. 30.

This Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge is based upon this Notice of Motion and Motion and objections, VPX's Memorandum of Points and Authorities attached hereto, the Declaration by Michael D. Kanach and exhibits thereto, the record before the Court, including the Parties' letter brief (ECF No. 77), the parties' informal oral argument (ECF Nos. 80-81), and the Magistrate Judge's Order (ECF No. 82), other filings by the Parties in this consolidated case, and upon such oral argument and written submissions that may be presented at, before, or in connection with the hearing on this motion. VPX informed Plaintiffs of its intent to file these objections and motion for reconsideration during the informal oral argument. (ECF No. 80.)

Dated: November 22, 2019

GORDON REES SCULLY MANSUKHANI, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

VPX respectfully objects and moves for Relief from Nondispositive Pretrial Order of Magistrate Judge pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Civil L.R. 72-2 and objects to the Honorable Robert M. Illman United States Magistrate Judge's order dated November 8, 2019, compelling VPX to produce its closely-held proprietary trade secret formula for its BANG® energy drinks (ECF No. 82) (the "Order").

I. INTRODUCTION

VPX’s formula is a valuable trade secret and VPX has gone to great lengths to protect that information. The two-tiered Protective Order in this case is not sufficient to protect VPX’s interests with respect to this extremely sensitive information which maintains value by not being known to VPX’s competitors, particularly Monster Energy Company (“Monster”), a plaintiff in a companion case in the Central District of California. In that case, *Monster Energy Company v. Vital Pharmaceuticals, Inc., et al.* (Central District of California, Case No. 18-cv-1882 JGB (SHKx)), (“Monster”), the Magistrate Judge recently ordered VPX to produce its formula. In response, to protect the confidentiality of its trade secret formula, VPX filed objections and a motion for reconsideration. If the Article III Judge denies VPX’s request and compels production in *Monster*, VPX intends to appeal.

Here, VPX objects to and moves for reconsideration of Magistrate Judge Illman’s Order on the basis that (1) the Order does not fully consider the harm to VPX and the risks associated with compelled disclosure of its highly sensitive information (including the potential that it is given to Monster, an aggressive competitor, at open hearings, trial, through industry experts, or otherwise), and (2) the Order does not properly evaluate whether VPX’s trade secret formula is “necessary” to the Parties’ respective claims and defenses.

In an effort to resolve this dispute, VPX agreed to disclose and did disclose that the quantity of creatyl-l-leucine (“CLL”) is less than 40 mg in 16 oz. cans of BANG® energy drinks that have the registered trademark SUPER CREATINE® on the label. VPX also disclosed that the BANG® products contain 300 mg of caffeine (as is publicly advertised on the can). With that information, Plaintiffs have no basis to argue that the entire, un-redacted formula is necessary in

1 this lawsuit. Thus, VPX asks the Court to deny Plaintiffs' motion to compel the remainder of the
 2 BANG® formula.

3 **II. FACTS**

4 The Order does not set forth the relevant excerpts of the discovery request at issue. ECF
 5 No. 82. However, it is not disputed: Plaintiffs seek the entire formula. There is likewise no
 6 dispute that the formula is VPX's valuable trade secret. (See Declaration of Michael D. Kanach
 7 ("Kanach Decl."), Exhibits A and B (declarations of Marc Kesten and Dr. Liangxi Li filed in the
 8 companion *Monster* case).) Mr. Kesten and Dr. Li's declarations establish the proprietary and
 9 secret nature of VPX's formula and the steps VPX takes to maintain its secrecy, as recognized by
 10 the Magistrate in *Monster*. (See *Monster*, ECF No. 136 (Magistrate's Order finding: "...
 11 Defendants have met their burden to show that [the BANG® formulae] are trade secrets or
 12 similar confidential information.").) As discussed in more detail *infra*, VPX is rightfully
 13 concerned that Monster and other competitors might obtain VPX's formula, suppliers, and/or
 14 quantities of ingredients.

15 There is reason to suspect coordination between Monster and class counsel in these
 16 consolidated cases. (See e.g., Kanach Decl., Exhibit C (*Monster*, ECF No. 31, Order granting
 17 motion to disqualify Monster's original counsel for ethical concerns, and finding at p. 5: "there is
 18 a 'is a reasonable probability that confidences were disclosed which could be used against the
 19 client in later, adverse representation...'"'), and Exhibit D (*Monster*, ECF No. 15, motion to
 20 disqualify and excerpts of Exhibits filed in support thereof).) Monster's disqualified counsel—
 21 who previously defended VPX in a nearly identical lawsuit—specifically signaled to the
 22 plaintiffs' bar to file copycat class action cases, stating to the press: "I would not be surprised if
 23 the (U.S. Food and Drug Administration) took action or if there are consumer class action
 24 lawsuits for false advertising." (*Monster*, ECF No. 15-5.) In a matter of weeks, the *Imran*
 25 Complaint was filed. (See ECF No. 1). Four additional class actions filings quickly followed.

26 **III. ARGUMENT**

27 **A. Legal Standard.**

28 Under Federal Rule of Civil Procedure 72(a), when a non-dispositive pretrial matter is

1 referred to a magistrate judge, a party may serve and file objections to the magistrate judge's
 2 order within fourteen days of being served with the order. Fed. R. Civ. P. 72(a). The objecting
 3 party must set forth specifically the portions of the Magistrate Judge's findings, recommendation or
 4 report to which an objection is made, the action requested and the reasons supporting the motion.
 5 Civil L.R. 72-2. The district judge must then "consider timely objections and modify or set aside
 6 any part of the order that is clearly erroneous or contrary to law." Fed. R. Civ. P 72(a). The
 7 "contrary to law" standard governs a district judge's review of a magistrate judge's
 8 determinations that are purely legal in nature. *Brooks v. Motzenbocker Advanced Developments, Inc.*, 2008 U.S. Dist. LEXIS 58608, 2008 WL 3049983, at *1 (S.D. Cal. Aug. 1, 2008). The
 9 "clearly erroneous" standard governs a district court's review of a magistrate judge's factual
 10 determinations. *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747-748 (9th Cir. 1990).

12 **B. PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF VPX'S
 13 PROPRIETARY BANG® FORMULA SHOULD BE DENIED.**

14 The Order compelling production of the entire BANG® formula underestimated the
 15 potential harm to VPX in forcing disclosure of its proprietary formula. There are no procedures
 16 in place to protect this valuable trade secret information from being disclosed at trial or during
 17 hearings, or being disclosed to industry experts who likely have relationships with VPX's
 18 competitors. Most importantly, the information is not necessary to Plaintiffs' claims, and
 19 disclosure is harmful to VPX. VPX has disclosed the quantity of CLL and caffeine in BANG®.

20 VPX respectfully requests that the Honorable District Court Judge make the following
 21 three findings of fact: *First*, consistent with the Magistrate Judge's Order in the *Monster* case,
 22 that VPX's formula is a proprietary trade secret. (*Monster* ECF No. 136, p. 7 ("Defendants have
 23 met their burden to show that the information sought in Plaintiff's Special Interrogatory No. 1
 24 are trade secrets or similar confidential information."); *see also*, *Monster* ECF Nos. 132-1 and
 25 132-2 (Declarations of Mr. Kesten and Dr. Li).)

26 *Second*, that VPX would be harmed by the disclosure of its trade secret formula to a
 27 competitor, particularly Monster, and by public disclosure of this information to undisclosed
 28 experts, at open hearings, and at trial.

1 **Third**, that disclosure of VPX’s secret formula is not necessary and Plaintiffs have not
 2 met their burden of showing otherwise. Because VPX disclosed that there is less than 40 mg of
 3 CLL and there is 300 mg of caffeine in a can of BANG®, the formula is not necessary. The
 4 Order is silent with respect to the relevance or need for the full formula. There is no need.

5 **C. VPX’s BANG® Formula is Proprietary, Trade Secret Information.**

6 Plaintiffs do not dispute that VPX’s proprietary formula for BANG® is a valuable trade
 7 secret, nor that it is important to VPX to keep such information secret. (See Kanach Decl.
 8 Exhibits A and B (Mr. Kesten Decl., ¶ 8; Dr. Li Decl., ¶ 26).)

9 **D. Since VPX Has Disclosed the Quantity of CLL and Caffeine in BANG®, the
 10 Remainder of the Formula, Supplier Information, and/or the Quantities of
 11 Other Ingredients Are Not Necessary.**

12 VPX’s trade secret formula is not necessary, even if VPX had *not* disclosed the quantity
 13 of CLL. *See e.g., Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288,
 14 293 (D. Del. 1985) (“To compel production of trade secret information, “[t]he level of necessity
 15 that must be shown is that the information must be necessary for the movant to prepare its case
 16 for trial, which includes proving its theories and rebutting its opponent’s theories.”). However,
 17 VPX agreed to disclose in this litigation information that was not previously disclosed,
 18 specifically that the quantity of CLL is less than 40 mg. VPX maintains that there is 300 mg of
 19 caffeine in the product. Moreover, both facts are readily verified by product testing. Plaintiffs
 20 have not and cannot show that the remainder of VPX’s BANG® formula is necessary in light of
 21 these disclosures.

22 **E. VPX is Rightfully Concerned with the Harm of Disclosure and Competitors’
 23 Interest in Exploiting the Formula for Competitive Purposes.**

24 VPX has well-founded concerns that Monster will go to great lengths to obtain and
 25 improperly use VPX’s formula. Monster recently launched a shameless knockoff of BANG®,
 26 i.e., “REIGN”, that copies nearly every aspect of BANG® except for one ingredient: CLL.¹
 27 Because CLL is patented and could not be replicated by Monster, Monster hired VPX’s former
 28

¹ Monster’s trade dress infringement is the subject of a separate lawsuit pending in the Southern District of Florida, *Vital Pharmaceuticals, Inc. v. Monster Beverage Corporation, et al.*, Case No. 0:19-cv-60809-UU. *See* Exhibit A to Mr. Kesten’s Declaration.

1 defense lawyer (who was later disqualified) to file the *Monster* case to discredit, in the minds of
 2 consumers, CLL, the only distinguishing feature between BANG® and REIGN; and such counsel
 3 also issued a press release clearly signaling to class action lawyers to file copycat lawsuits.
 4 Kanach Decl. Exhibit D (Monster ECF No. 15-5). At the same time, Monster orchestrated a
 5 furtive disinformation campaign via a shame website called
 6 “THETRUTHABOUTBANG.COM” (“TAB”) to denigrate BANG® and its CEO.² Monster then
 7 secretly hired “influencers” through a third party to spread the TAB falsities via social media.
 8 VPX reasonably suspects that class counsel are coordinating their defense with the prosecution
 9 of the *Monster* case.

10 Monster has shown that it will go to any length to destroy BANG® and recover market
 11 share from VPX. Disclosure of the complete BANG® formula serves only to further Monster’s
 12 goal: copy, then destroy. No protective order is sufficient under these circumstances to protect
 13 this information. *Lakeview Pharmacy of Racine, Inc. v. Catamaran Corp.*, 2017 U.S. Dist.
 14 LEXIS 163624 (M.D. Pa. Sep. 28, 2017) (“[I]t would be divorced from reality to believe that
 15 either party here would serve as the champion of its competitor . . . to maintain the
 16 confidentiality designation or to limit public disclosure . . . during trial.” (*quoting Micro Motion,*
 17 *Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990)).

18 This Court should deny access to VPX’s proprietary formula because the risk is great that
 19 it could get into the hands of competitors, as “courts have routinely recognized that ‘disclosure to
 20 a competitor is more harmful than to a noncompetitor.’” *American Standard, Inc. v. Pfizer, Inc.*,
 21 828 F.2d 734, 741 (Fed. Cir. 1987) (*citing Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D.
 22 288, 293 (D. Del. 1985)).

23 **IV. CONCLUSION**

24 VPX respectfully requests an order denying Plaintiffs’ motion to compel VPX’s secret
 25 formula.

26
 27 ² Monster’s false advertising and unfair competition are the subject of a separate lawsuit, also
 28 pending in the Southern District of Florida, *Vital Pharmaceuticals, Inc. v. Monster Beverage*
Corporation, et al., Case No. 0:19-cv-61974-RS. See Exhibit B to Mr. Kesten’s Declaration.

1
2 Dated: November 22, 2019

GORDON REES SCULLY MANSUKHANI, LLP

3
4 By: /s/ Michael D. Kanach

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, 275 Battery Street, Suite 2000, San Francisco, CA 94111, my electronic mail address is mkanach@grsm.com. On November 22, 2019, I served the foregoing document(s) entitled:

**DEFENDANT'S MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE** as follows:

BY ELECTRONIC SERVICE THROUGH THE CM/ECF SYSTEM which automatically generates a Notice of Electronic Filing at the time said document is filed to all CM/ECF Users who have appeared in this case. Service with this NEF constitutes service pursuant to FRCP 5(b)(E).

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on November 22, 2019 at San Mateo, California.

/s/ Michael D. Kanach

Michael D. Kanach

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